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We think, however, that the Magistrate was wrong in making use of his information, which he seems to have obtained otherwise than as a Magistrate. He was also wrong in using the circumstance of the similarity of names. That was not a circumstance which in the least could assist the Magistrate in coming to the conclusion of this kind. If it were so, any woman, by naming her child after a particular individual, might be able to make evidence in favour of herself, and thus give rise to a failure of justice. The Magistrate was therefore wrong in mixing up all these matters. But apart from these circumstances, there is ample evidence upon which the Magistrate could have made the order, and we have no reason to doubt the correctness of such order. The rule is discharged.

H. T. H. *Rule discharged.*

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Rampini.

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June 26.

AUBHOY CHURN MOHUNT (PLAINTIFF, OPPOSITE-PARTY IN THE RULE) *v.* SHAMONT LOCHUN MOHUNT (DEFENDANT, PETITIONER IN THE RULE).*

Review of judgment—Code of Civil Procedure (Act XIV of 1882), *ss.* 623, 627, 629—*Letters Patent, s.* 15—*Practice.*

A second appeal was decided on the 1st June 1888 in favour of the respondent by Mr. Justice Wilson and Mr. Justice Beverley. On the 24th July 1888 an application for review was filed with the Registrar. Various reasons prevented the learned Judges above-named from sitting together until the month of March 1889. On the 6th March, the matter came up before their Lordships, when a rule was issued, calling upon the other side to show cause why a review of judgment should not be granted, being made returnable on the 28th March 1889.

On the 28th March, Mr. Justice Wilson had left India on furlough, and the rule was taken up, heard, and made absolute, by Mr. Justice Beverley, sitting alone: *Held*, that Mr. Justice Beverley had jurisdiction to hear the rule, and further that the order of that learned Judge was not a judgment within the meaning of s. 15 of the Letters Patent; and that no appeal

* Appeal under s. 15 of the Letters Patent against the order of Mr. Justice Beverley, one of the Judges of this Court, dated the 22nd of May 1889, in Rule No. 312 of 1889, in appeal from Appellate Decree No. 233 of 1888.

would lie therefrom, the order being final under s. 629 of the Code of Civil Procedure.

Bombay-Persia Steam Navigation Company v. *The Zuari* (1) and *Achaya* v. *Ratnavelu* (2) approved

ON the 1st June 1888, a certain second appeal was decided by Mr. Justice Wilson and Mr. Justice Beverley in favour of the defendant, respondent. On the 24th July 1888 the plaintiff being dissatisfied with that decision, presented an application for a review of judgment, which, in the ordinary course, was filed in the Office of the Deputy Registrar, but in consequence of the absence from Calcutta of one or other of the learned Judges who had decided the appeal, Mr. Justice Beverley having in August 1888 left Calcutta on leave returning in November in that year, and Mr. Justice Wilson being absent on deputation at the time of the return of Mr. Justice Beverley, and not returning to Calcutta till after the expiration of six months from the 24th July 1888, the rule to show cause why the review should not be heard was not issued until the 6th March 1889. The rule so granted was made returnable on the 28th March, but previously to that date, on the 6th March, Mr. Justice Wilson left India on furlough, and did not return to India until a period of more than six months had expired from that day. On the 28th March, the rule came up before Mr. Justice Beverley, sitting alone. At the hearing, an objection was taken that, under s. 627 of the Code his Lordship Mr. Justice Beverley had no jurisdiction to hear the rule; and that the proper course to be pursued was to direct the matter to stand over until the return from furlough of Mr. Justice Wilson; the contention raised upon that section was that inasmuch as both Mr. Justice Wilson and Mr. Justice Beverley were "attached to the Court" at the time the application was presented (whether the date be taken to be the 24th July 1888 or the 6th March 1889), and were not precluded by absence or other cause for a period of six months next after the application from considering the matter, those learned Judges were bound to hear the application as a Bench sitting together, and that no other Judge or Judges could hear it.

(1) I. L. R., 12 Bom., 171. (2) I. L. R., 9 Mad., 253.

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On this contention, Beverley, J., said :—" If the date of the application be taken to be, as I think it must be taken to be, the 24th July 1888, the facts are as follows : At the beginning of August I left Calcutta on leave, and when I resumed my seat in Court after the Vacation, Wilson, J., was absent at Poona. He did not return till after the 24th July 1888, and we were, therefore, precluded from sitting together to hear the application.

" If, on the other hand, the 6th March 1889 be taken as the date of the application, Mr. Justice Wilson took leave at the end of that month, and will not return to the Court till after the expiration of six months from that date . . . . . It seems to me that under the spirit of the section referred to, I, and I alone, am bound to hear this rule. The section is apparently intended to refer to a High Court which is specially excepted from the rule laid down in s. 624 . . . . . Section 627 imposes a very reasonable and proper restriction, and that restriction is this, that when the Judges, or any one of them who made the decree, can hear the application, within six months after its presentation, they or he, and they or he only, shall hear it.

" Now the present rule was granted by Mr. Justice Wilson and myself, but it does not follow that we must both hear it as a Bench sitting together; had Mr. Justice Wilson been absent for six months after the application, I should have had jurisdiction to grant the rule and hear it sitting alone. The case seems to me stronger when the rule was issued by both of us. I may draw attention to the analogous provisions contained in s. 626, proviso (*c*). I come to the conclusion that I have jurisdiction to hear the application sitting alone, and that to prevent further delay, I am bound to do so."

His Lordship then heard the rule and made the same absolute, directing the papers to be laid before the Chief Justice for the appointment of a Bench to hear the review.

Against that decision an appeal under s. 15 of the Letters Patent was made.

Mr. *Hill* (with him Baboo *Baikant Nath Dass*), for the appellant, contended that the matter ought to have been allowed

to stand over until the return of Mr. Justice Wilson; or that an application should have been made to the Chief Justice to appoint another Judge to sit with Mr. Justice Beverley to hear the review. He also contended that at all events the Court had jurisdiction under the Letters Patent to consider the case on its merits; the rule being made absolute by one learned Judge, it was a judgment within the meaning of s. 15 of the Letters Patent, and that, notwithstanding the provisions of s. 629 of the Code, an appeal would lie to this Court.

Mr. *Evans* (with him Baboo *Kishori Lall Sircar*), for the respondent, contended that Mr. Justice Beverley had jurisdiction to hear the rule, and that no appeal would lie from his order, citing *Achaya* v. *Ratnavelu* (1) and *Bombay-Persia Steam Navigation Company* v. *The Zuari* (2).

The judgment of the Court (PETHERAM, C.J., and RAMPINI, J.) was delivered by

PETHERAM, C.J.—This is an appeal under s. 15 of the Letters Patent from an order of Mr. Justice Beverley, making a rule absolute to re-hear an appeal.

The case was originally a second appeal to this Court, which was heard by a Bench of this Court consisting of Mr. Justice Wilson and Mr. Justice Beverley. The second appeal was decided on the 1st June 1888, and it was decided in favour of the defendant; and the plaintiff, being dissatisfied with that decision, was desirous of having it reviewed, and, accordingly, on the 24th July 1888, an application for review bearing the proper stamp was filed with the Deputy Registrar of this Court. Section 623 of the Code of Civil Procedure provides that such an application shall come before the Judge or Judges who were parties to the original decree. Those Judges, as I said just now, were Mr. Justice Wilson and Mr. Justice Beverley. Various reasons prevented them from sitting together until the month of March 1889, and, on the 6th of that month, the matter was presented before those learned Judges, and upon its being so presented, they issued a rule calling upon the other side to show cause why the application should not be granted. The practice is, that such

(1) I. L. R., 9 Mad., 253. (2) I. L. R., 12 Bom., 171.

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applications should be presented in this way, and if the Judges, before whom the application is made, think there is anything in it, they grant a rule calling upon the other side to show cause against it; and the whole of these proceedings, the granting a rule and the argument of the rule when it is returned, are treated within the meaning of Chap. XLVII of the Code of Civil Procedure as being an entire application.

That being the state of things and the rule having been granted and made returnable on the 28th March, Mr. Justice Wilson took furlough and left before the 28th March, at any rate he was absent from Court on the 27th; so that when the rule was returned, one of the Judges had gone, and inasmuch as he was absent on furlough and another Judge appointed to officiate for him, we think he was not then attached to the Court within the meaning of s. 627 of the Code.

Then the question arises, what is to be done? The rule being returnable on the 28th, was heard by Mr. Justice Beverley alone. The present contention of the appellant is that that procedure was wrong, and either the matter ought to have stood over until Mr. Justice Wilson returned, or else that an application ought to have been made to me as Chief Justice to appoint another Judge to sit with Mr. Justice Beverley to form a Bench to hear it.

I do not think that it could be necessary for the matter to stand over, and I do not think that, if an application had been made to me, I should have had jurisdiction to hear it, and for this reason. The latter part of s. 627 of the Code provides that no other Judge or Judges of the Court, excepting the Judge or Judges who was or were parties to the original judgment, shall hear the application for review if the Judge or Judges or any one of them is still attached to the Court; so that it seems to me that although the Chief Justice of this Court has in general the duty cast upon him of appointing the Judges who are to constitute particular Benches for particular business, in these cases the constitution of the Bench is taken out of his hands, and is provided for by the Code; for the Code says that these applications shall be heard by the Judge or Judges remaining attached to the Court by whom the original decree was given.

As I said just now, at the time this rule was returned Mr.

Justice Wilson had gone away on furlough and another gentleman had been appointed to perform his duties, and, consequently, he had ceased to have any jurisdiction as a Judge of this Court for the time. He was not at the time attached to the Court, and, consequently, Mr. Justice Beverley was the only one of the Judges who heard the appeal who remained attached to the Court, and was, in my opinion, the only Judge who could be appointed to hear this application. So that in our opinion Mr. Justice Beverley was quite right in deciding that he had jurisdiction to hear the matter, and was in fact the only person who could hear it. That ground therefore fails.

The other point made by the appellant here is that we have jurisdiction under the Letters Patent to consider the question on the merits, whether Mr. Justice Wilson and Mr. Justice Beverley were right in granting a rule, and whether Mr. Justice Beverley was right in making it absolute; and this argument proceeds upon the ground that inasmuch as the rule was made absolute by one Judge, that is a judgment within the meaning of s. 15 of the Letters Patent, and that, notwithstanding the provisions of s. 629 of the Code of Civil Procedure, an appeal lies to this Court.

The first question is, whether that is a decision within the meaning of that section of the Letters Patent? In my opinion it is not, because the Courts have laid down over and over again, I think up to the Privy Council, that "judgment" there means a judgment that decides the rights of the parties. This order of Mr. Justice Beverley, making this rule absolute, did not decide the rights of the parties in any sense. All it decided was that in his opinion the trial of the appeal had been unsatisfactory, and it would be in the interests of justice that it should be re-heard. It decides nothing more. The rights of the parties are still at large as before. In addition to that, we think that the matter is limited by the terms of s. 629. That section provides that the order rejecting the application shall be final. It then goes on to say, that an order admitting the application may be appealed against on several grounds, and it seems to us that the meaning of that is, that it may be appealed against on those grounds and no other; and that being the case, it, in our

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opinion, takes away an appeal in the matter, because the Code does contemplate this matter being heard under certain possibilities by one Judge and then takes away an appeal from his decision.

Under these circumstances it seems to me that on neither of these grounds can an appeal be entertained on the merits. The two cases in the Madras and Bombay High Courts, *viz.*, *Achaya* v. *Ratnavelu* (1) and *Bombay-Persia Steam Navigation Company* v. *The Zuari* (2), take the same view of the matter, and as to those decisions it is sufficient for us to say that we entirely agree with them. In the result this appeal will be dismissed with costs.

T. A. P. *Appeal dismissed.*

Before Sir W Comer Petheram, Knight, Chief Justice, and Mr. Justice Gordon.

1889
July 18.

BASHARUTULLA (ONE OF THE DEFENDANTS) *v.* UMA CHURN DUTT (PLAINTIFF) AND OTHERS (DEFENDANTS).*

Sale in execution of decree—Proclamation of sale—Sale before hour fixed—Civil Procedure Code (Act XIV of 1882), s. 287—Sale set aside as being no sale—Execution—Possession, Recovery of.

A property, advertised for sale under s. 287 of the Code of Civil Procedure, was sold on the day fixed, but at an earlier hour than that stated in the proclamation: *Held*, that there had been no sale within the meaning of the Code; proclamation of the time and place of sale and the holding of the sale at such time and place, being conditions precedent to the sale being a sale under the Code.

THIS was a suit for possession of a certain jumma under the following circumstances:—

The defendants, Nos. 2, 3, 4 and 5, who were the landlords of the plaintiff, had obtained a rent-decree against the plaintiff, and in execution of this decree, the jumma belonging to the plaintiff was advertised for sale, the sale being fixed for the 20th June 1885.

* Appeal from Appellate Decree No. 1671 of 1888, against the decree of Baboo Krishna Mohun Mookerjee, Subordinate Judge of Khulna, dated the 28th of July 1888, reversing the decree of Baboo Saroda Pershad Chatterjee, Munsiff of Baglahat, dated the 30th June 1888.

(1) I. L. R., 9 Mad., 253. (2) I. L. R., 12 Bom., 171.

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Before the day on which the sale was fixed arrived, the plaintiff arranged with his landlord to stay the sale on payment of a portion of the decretal money, and on a *kistibundi* being entered into this arrangement was communicated by the landlord to his Naib with directions to him to stay the sale. On the 20th June the plaintiff and the defendant's Naib proceeded to the Court House to stay the sale, reaching the Court before twelve o'clock. On so arriving, they discovered that the sale had been held by the Munsiff at 10-30 instead of at twelve o'clock, as advertised, and that there being no other purchasers at that early hour, the jumma in question was purchased by the defendant No. 1, a pleader of the Court. The plaintiff (after failing to come to terms with the purchaser) then applied under s. 311 of the Civil Procedure Code to have the sale set aside. This application was rejected, and the sale was in due course confirmed. The plaintiff thereupon brought this present suit to recover possession of the jumma.

The defendant No. 1 alone appeared, and contended that as the sale had not been held fraudulently, it could not be set aside.

The Munsiff found that it had not been established that the sale at an early hour was the effect of a preconcerted plan on the part of the decree-holder with the intention of defrauding the plaintiff; that, if such facts had been shown, they would have formed good reasons for setting aside a sale under an application made under s. 311 of the Code, but that the plaintiff had failed to substantiate such facts in his application under that section, which had been dismissed by an order which had been unappealed against; that under s. 244 of the Civil Procedure Code, the plaintiff could not raise the question again in a civil suit; but that at least, if such a suit as the present would lie, there must be clear evidence (which there was not) to show that the defendant No. 1 was a party to the fraud (if any) alleged. He therefore dismissed the suit.

The plaintiff appealed to the Subordinate Judge, who held that the sale held before the hour fixed was absolutely void, and reversed the decision of the Munsiff.

The defendant appealed to the High Court.

Moulvi *Mahomed Yusuf,* for the appellant, contended, that what had taken place was a mere irregularity, and the sale could

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only be set aside on that ground under s. 311 of the Code; a suit being expressly excluded by that section and cited *Sharoda Churn Chuckerbutty* v. *Mahomed Isuf Meah* (1), which followed the case of *Virararghava* v. *Venkata* (2), on the question as to whether the suit would lie.

Baboo *Srinath Banerjee*, for the respondent, contended, that the sale proclaimed under s. 287 of the Code had not been carried out; and that there had been no sale within the meaning of the Code and therefore no property could pass to the purchaser.

The judgment of the Court (PETHERAM, C. J., and GORDON, J.) was delivered by

PETHERAM, C.J.—This is a suit which has been brought by the plaintiff against the defendants, claiming various reliefs, and, among other things, the plaintiff claims to set aside the sale of certain property as being fraudulent, and, in addition to that, he claims to recover possession of that property from the defendants, and he claims any other relief to which he may be found entitled. The Judge has decreed the suit, and the appeal has been preferred to this Court, really on the ground that such a suit will not lie at all by reason of the provisions of the Code of Civil Procedure.

The facts of the case are that the present plaintiff had a decree passed against him for a sum of money due to certain persons, some of whom were his landlords, or at all events his judgment-creditors. He did not pay that money, and his property was attached and was proclaimed for sale by reason of the plaintiff's failure to pay the sum decreed, and according to the proclamation, the sales, amongst which the sale of this particular property was one, were advertised to take place on a certain day. Before that day arrived, the present plaintiff arranged with his creditors to pay them off the amount of their decree by instalments, and that the property should be released from attachment and not sold, and upon the faith of that arrangement, both the present plaintiffs and his three creditors attended at the place of sale at 12 o'clock on the day stated in the proclamation, and

(1) I. L. R., 11 Calc., 376. (2) I. L. R., 5 Mad., 217.

found, when they got there, that the sales were all over; and that the sales, instead of commencing at 12 o'clock, had commenced at about 10 o'clock, and concluded before 12 o'clock, the advertised time. Under these circumstances, an application was made by the plaintiff to get that proceeding set aside for irregularity, and that proceeding was disposed of by an arrangement made between the plaintiff and the present defendants that a certain sum of money should be paid by the present plaintiff, being the amount which the purchasers had paid; and that the purchasers should withdraw all claim to the property. The proceeding to set aside the sale accordingly went off upon that arrangement being come to, but afterwards, as the Judge finds, the purchasers, the present defendants, refused to carry out their part of the agreement in this sense, that they said, we decline to give up all claim to this property upon the payment of the purchase-money into Court. Upon this, the arrangement fell through, and the purchasers got possession of the property under their sale certificate, and upon that the plaintiff brings this suit for the purpose of getting back his property, and of having it declared that this sale did not affect his right to possession at all.

If what took place was a mere irregularity, then the only proceeding for setting the thing aside was a proceeding under s. 311 of the Code of Civil Procedure, the latter portion of that section providing that no suit shall be brought to set aside a sale for mere irregularities; but if the sale took place under such circumstances that it was not a sale under the Code at all, then it is contended that no property passed under it, and that the judgment-debtor has a right to bring this suit to get back his property, and to have it declared that the purchasers have no right to it at all.

The question then is, whether what took place here was an irregularity only, or whether there was no sale within the meaning of the law at all.

By s. 287 of the Code, it is provided that, when any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court. Such proclamation shall

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state the time and place of sale, and shall specify fairly and accurately certain other things.

There is then a provision in the Code that, before a sale takes place, the time and place of sale shall be advertised. It is perfectly true that there is no provision in the Code that the sale shall take place at the time and place advertised, but it is clear that such a provision must be implied, and that consequently no sale can take place under the Code except at the time and place advertised under the Code.

As a matter of fact, the sale in this case did not take place at the time advertised. When the time advertised arrived, the property had been sold, and the whole thing was over; and when persons came for the purpose of attending the sale at the time advertised, they found that the property had been sold, and that they were too late.

Under these circumstances, it seems to us that there was no sale within the meaning of the Code at all, and that this proclamation of the time and place of sale and the taking place of the sale at the time and place advertised are conditions precedent to its being a sale under the Code at all. Under these circumstances, it appears to us that this property never has been sold under the Code, and consequently the plaintiff is entitled to a declaration that whatever took place when the property was put up for sale has no effect as against him, and that he is entitled to recover this property.

A case has been cited, which was decided by Mr. Justice Pigot and Mr. Justice Beverley, of *Sharoda Churn Chuckerbutty* v. *Mahomed Isuf Meah* (1). That case proceeded upon s. 244 of the Code of Civil Procedure, and not upon the sections now under our consideration. It seems to us that that case has no bearing upon the present one, and that the Judge was right in the conclusion at which he arrived, and this appeal must be dismissed with costs.

T. A. P. *Appeal dismissed.*

(1) I. L. R., 11 Calc., 376.